53

Supreme Court, U.S.
FILED

061379 DEC 18 2007

OFFICE OF THE CLERK

DOCKET NO.

IN THE UNITED STATES SUPREME COURT

STEPHEN D. TAYLOR,

Petitioner,

vs.

SUSAN GASINK BATEMAN,
BROOKS BATEMAN,
JENNIFER LYNN MATHIE,
JAMES MATHIE

Respondents.

On Petition for Writ of Certiorari
to the Florida Supreme Court

PETITION FOR WRIT OF CERTIORARI

Paul Richard Bloomquist, Esq.
Attorney for Petitioners
Ringer, Henry, Buckley and Seacord, P.A.
14 East Washington Street
Suite 200
Orlando, Florida 32802
(407) 841-3800

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Due Process Clause as interpreted by the Supreme Court in Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1971) and Mooney v. Hollohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed.2d 791 (1935) required the Court to grant Plaintiff's amended motion for a new trial if post-trial judicial admissions proved that the defendants prevailed after presenting false testimony on a crucial issue of fact relating to liability?

2. Whether it was an abuse of discretion to deny Plaintiff's motion for a new trial because the verdict in favor of the Mathies' was against the manifest weight of the evidence?

3. Whether the trial Court committed reversible error by excluding Plaintiff's expert testimony from evidence?

TABLE OF CONTENTS

	Pages
Questions Presented for Review	i
Table of Contents	ii - iii
Table of Cited Authorities	iv – vii
Citations of Official and Unofficial Reports of Opinions	1
Statement of Basis for Supreme Court Jurisdiction	1
Constitutional Provisions Involved in the Case	1
Statement of the Case and the Facts	1 - 17
Argument	
Point I--Denial of Plaintiff's amended motion for a new trial was fundamental error because Susan Bateman's false testimony warranted a new trial.	18 - 26
Point II--Exclusion of Plaintiff's expert opinions was judicial error that led to a manifest injustice.	26 - 29
Conclusion	30
Footnotes	30

Appendix		31
1	Order of Florida Supreme Court denying Petition for review 9/21/06	32 – 33
2	Opinion rendered by Fourth District Court of Appeal	34 – 36
3	Verdict	37
4	Final judgment for Defendants	38 – 39
5	Order denying Plaintiff's motion for new trial (issues deferred) and amendment thereto	40 – 41
6	Excerpt of Appellant's motion for rehearing	42 – 43
7	Florida Evidence Code sections	44 – 45
8	Diagram of scene of accident prepared during deposition of Frederick McAninch	46

TABLE OF CITED AUTHORITIES

Cases	Pages
Alexander v. Penske Logistics, Inc., 867 So.2d 412 (Fla. 3d DCA, 2003)	27
Alston v. Shiver, 105 So.2d 785 (Fla. 1958)	10, 13, 18, 19
Bryant v. Buerman, 739 So.2d 710 (Fla. 4th DCA 1999)	15
Drackett Products Co. v. Blue, 152 So.2d 463 (Fla. 1963)	26
Figueredo v. Keller Industries, Inc., 583 So.2d 432 (Fla. 3d DCA 1991)	27
Gaiter v. Winn Dixie Stores, 376 So.2d 912 (Fla. 3d DCA 1979)	19, 20
Giglio v. United States, 405 U.S. 150, 92 S.C5. 763, 31 L.Ed.2d 104 (1971)	13, 18
Hooters of America, Inc. v. Carolina Wings, Inc., 655 So.2d 1231 (Fla. 1st DCA 1995)	18
Kenet v. Bailey, Hunt, Jones and Busto, 785 So.2d 515 (Fla. 3d DCA) cert. den. 792 So.2d 1213 (Fla. 2001)	10, 13, 18, 19, 20
Kornblum v. Schneider, 609 So.2d 138 (Fla. 4th DCA, 1982)	21

Martinez v. Vega,
751 So.2d 1268 (Fla. 3d DCA 2000) 28

Mooney v. Holohan,
294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 91
(1935) 13, 18

Ogburn v. Murray,
86 So.2d 796 (Fla. 1956) 19

Ornellas v. United States,
517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d
911 (1996) 26

Pullman-Standard v. Swint,
456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d
66 (1982) 26

Sanford v. Rubin,
237 So.2d 134 (Fla. 1970) 18

Savino v. Florida Drive In Theatre
Management, Inc., 697 So.2d 1011
(Fla. 4th DCA 1987) 22

Simmons v. Conger,
86 F.3d 1080 (11th Cir. 1996) 26

Skipper v. Schumacher,
124 Fla. 384, 169 So. 58 (1936) 13, 18

Spencer v. State,
842 So.2d 70 (Fla. 2003) 13, 18

Storm v. Allied Universal Corp.,
825 So.2d 241 (Fla. 3d DCA 2001) 19, 21

Taylor v. Bateman.
927 So.2d 1024, 31 Fla. L. Weekly D1235
(Fla. 4th DCA 2006), rev. den.
940 So.2d 1125 (Fla. 2006). 1

Zwinge v. Hettinger.
530 So.2d 318 (Fla. 2d DCA 1988) 27

Constitution

U.S. Const., amend XIV, s.1 1

Statutes

Florida Statutes s. 90. 108 23

Florida Statutes s. 90.402 27

Florida Statutes s. 90.614(2) 23

Florida Statutes s. 90.702 27

Florida Statutes s. 90.703 27

Florida Statutes s. 90.705(2) 27

Florida Statutes s. 90.952 23

Florida Statutes s. 90.953(2) 23

Rules of Procedure

Florida Rule of Civil Procedure 1.370 (2004) 11, 14

Secondary Authorities

Padovano. Florida Appellate Practice. s 9.5. 26
pps. 169-170 (Thomson-West. 2006)

CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

The opinions below are cited as follows: Taylor v. Bateman, 927 So.2d 1024, 31 Fla. L. Weekly D1235 (Fla. 4th DCA 2006), rev. den. 940 So.2d 1125 (Fla. 2006).

STATEMENT OF BASIS FOR SUPREME COURT JURISDICTION

This is a petition for a writ of certiorari to the Florida Supreme Court and the Fourth District Court of Appeal. Petitioner Plaintiff seeks review of a judgment entered on September 21, 2006. There was no motion for rehearing. The statute that confers jurisdiction on this Court is 28 U.S.C. s. 1257.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

U.S. Const., amend XIV, s. 1: "...nor shall any State deprive any person of life, liberty, or property without due process of law..."

Florida Statutes sections 90.108, 90.402, 90.614(2), 90.702, 90.703, 90.705, 90.952 and 90.953(3) are in the appendix.

STATEMENT OF THE CASE AND THE FACTS

This is a petition for a writ of certiorari. Plaintiff-Petitioner, Stephen D. Taylor, seeks reversal of a final judgment entered pursuant to a jury verdict in favor of all defendant-respondents.

Mr. Taylor sued Defendants, Susan Bateman, Brooks Bateman, Jennifer Mathie, and James Mathie. He contends

that he sustained an injury to his right shoulder as a result of two collisions.

First collision

This case involves a motor vehicle collision that happened on July 23, 1996 at the intersection of Lyons Rd. and S.W. 18th St. in Boca Raton, Florida. Stephen Taylor contends that Susan Bateman ran a red light and caused the collision and his damages. The parties stipulated that Mr. Taylor drove south on Lyons Rd. and Mrs. Bateman drove east on S.W. 18th St. [R1552] During the trial, the parties offered the following evidence as to liability for the first collision.

Stephen Taylor

Stephen Taylor testified he had a green light. He said he drove south on Lyons Rd. to the intersection with S.W. 18th St.. When he arrived at the intersection, his light was red, so he stopped. After his light turned green, he went forward and accelerated normally to the point of impact. He saw the Batemans' minivan an instant before the impact. It slammed into the right front door of his pick up truck. The impact pushed his truck to the left and spun it in a counterclockwise direction. After that impact, Mr. Taylor's truck hit a car driven by Frederick McAninch.

Frederick McAninch

An eyewitness in another car, Frederick McAninch, corroborated Mr. Taylor's testimony by saying that he observed a traffic pattern consistent with a green light for Mr. Taylor.

Mr. McAninch testified that he drove north on Lyons Rd. to the intersection with S.W. 18th St. [R2180] When he

arrived at the intersection, his light was red, so he stopped. [R2182, A-8] He intended to turn right and go east on S.W. 18th St. [R2182] He waited for the traffic to clear. [R2183]

While he waited there, he saw traffic going east and west on S.W. 18th St. stop. [R2195] A car stopped in the outside eastbound lane of S.W. 18th St. [R2196-2197, A-8] He also saw a car which had been heading south on Lyons Rd. turn left and go east on S.W. 18th St. [R2189-2191, 2194-2195, A-8] That car made a wide turn and entered the outside eastbound lane of S.W. 18th St. [R2190] Mr. McAninch had to wait for the car to complete its turn. After it turned, Mr. McAninch heard a sound, looked to his left, and saw the Batemans' minivan strike Mr. Taylor's pickup truck. [R2194-2195, 2183] Thereafter, Mr. Taylor's pick up truck came toward Mr. McAninch and struck his car. [R2183]

Susan Bateman

Susan Bateman testified she had a green light. She said that she drove east on S.W. 18th St. to the intersection with Lyons Rd. She also testified as follows:

> "Q. Okay, tell us what happened from the time you were heading east as you approached the intersection with Lyons Rd.
>
> "A. I looked up to see the intersection and the light was green so I was checking my speed because I was approaching an intersection and then I looked up again. The light was still green and I saw vehicle coming from the northbound--from the north heading southbound on Lyons at a high rate of speed.
>
> "So I hit the brakes and I looked over my right shoulder to see if there was an escape route so I could avoid the accident, but there

was a gold car there. So I couldn't go that way and all I could do is hit the brakes, hit it with both feet as hard as I could." [R2572]

***

"Q. Your first reaction was to apply the brakes or begin to apply the brakes?

"A. Yeah.

"Q. And then you looked over your right shoulder?

"A. Yes.

"Q. Were you looking at the rear or side view mirror or--

"A. No.

"Q. Where were you looking?

"A. Out the window.

"Q. So the van is such that you can actually see if you turn to your right?

"A. Yes.

"Q. And what color vehicle was the vehicle you saw?

"A. It was gold. It was a little car, a Toyota or something.

"Q. Was that vehicle traveling with you?

"A. Yes.

"Q. Or was it stopped?

"A. No, it was moving. [R2572]

Miles Moss

Traffic Engineer and Accident Reconstructionist, Miles Moss also testified during the trial. He corroborated Mr. Taylor's testimony by testifying that Mr. Taylor's speed at the time of impact was consistent with normal acceleration from the place where Mr. Taylor said he stopped before entering the intersection. [R2319-2320]

Please understand how Mr. Moss analyzed this case. Mr. Moss started by determining the speeds of the vehicles at the time of impact. First, he did a momentum study. The momentum study showed that Mr. Taylor was going 21 miles per hour and Mrs. Bateman was going 27 to 28 miles per hour at the time of impact. [SR 397-398, 427] Second, Mr. Moss verified the results of his momentum study by analyzing the crush damage to the vehicles. [SR 400, 429]

Mr. Moss measured the distance between the point of impact and the stop bar in the southbound lane of Lyons Rd., which was 87 feet. [SR415]

Mr. Moss's calculations showed that acceleration from 0 to 21 miles per hour over 87 feet produces .17 G's. [SR415] According to the literature, average driver acceleration is .15 to .20 G's. [SR414, 434-435] Mr. Taylor's 21 mile per hour speed was inconsistent with any scenario other than normal acceleration from a stopped position at the stop bar in the southbound lane of Lyons Road 87 feet from the point of impact. [SR415, 434] The speed limit was 45. Probably, Mr. Taylor did not usually drive 21 miles per hour in a 45 mile per hour zone. [SR434] Also, Mr. Taylor's truck did not leave any skid marks indicative of hard braking. [SR434]

Therefore, Mr. Taylor's speed at the time of impact corroborated his testimony that he stopped at the red light and after the light turned green, he accelerated normally 87 feet to the point of impact. [SR409]

During cross-examination, Mr. Moss also testified that a policeman named Corporal Stickley testified in deposition that before the collision, a fourth vehicle turned left at the intersection, went east on S.W. 18th St., and pulled over to the side of the road. [R2110]

Mr. Moss would have also testified that Susan Bateman ran a red light and caused the collision, but the trial Court would not let him. Defendant objected that the opinions "are not expert opinions and are not going to aid

this jury." [R2292] The Court did not talk about that objection. However, the Court conducted a voir dire examination of the expert and reviewed the expert's written statement of the factual basis for his opinions:

> "9. ...Susan Bateman was probably reacting to a red traffic signal.
>
> "10. The vehicle traffic conditions as observed by Fred McAninch:
>
> - Southbound left turning vehicle completed turn just prior to impact.
> - Eastbound vehicles stopped in Eastbound left turn lane and Eastbound right lane
> - Westbound vehicles stopped
>
> is consistent with Taylor vehicle accelerating from a stopped position on a green signal display and the Bateman vehicle entering the intersection on a red signal display.
>
> "12. Failure of Susan Bateman to stop at red signal display, and to yield the right of way to the Taylor vehicle was the proximate cause of the crash." [R2305, 2017-2019]

The momentum study and analysis of crush damage to the vehicles also showed that Mrs. Bateman's speed at the moment of impact was 27 to 28 miles per hour. [SR427] Reasoning as follows, Mr. Moss determined that Susan Bateman applied her brakes before she ever saw Mr. Taylor's truck, most likely in response to a red light (contrary to her deposition testimony). [SR410, 453]

During her deposition, Mrs. Bateman testified she had been going **45** miles per hour before she applied her brakes, but the momentum study showed she was going **27 to 28** miles per hour at the time of impact. After maximum braking, how much time and distance were required for her

to slow down from 45 to 28 miles per hour? According to "endless" studies, the answer is **one second** and **51-52** feet. [SR 430, 435, 441]

Mr. Moss added to that time and distance the normal perception/reaction time and distance. According to the studies, normal perception/reaction time is **1 to 2 1/2 seconds**. [SR431] Mrs. Bateman said she was going **45 miles per hour** (which is equivalent to 66 feet per second [SR453]) before she applied her brakes. Assuming Mrs. Bateman took the minimum normal perception/reaction time, she traveled at least **66** feet between the time she saw whatever motivated her to apply her brakes and the moment when she stepped on her brake pedal. Therefore, Mrs. Bateman went **117 to 217** feet between the time she began to "react" and the moment of impact. [SR431]

That conclusion is inconsistent with Mrs. Bateman's deposition testimony that she slammed on her brakes because she saw Mr. Taylor's truck when she was only three to five car lengths from the intersection. [SR452] Three to five car lengths is equivalent to **48 to 80** feet. [SR357,452]

If really Mrs. Bateman began to brake before she saw Mr. Taylor's truck, what was she reacting to? What might she have seen?

The only other possibility shown by the evidence was the red light. [SR410] If Mr. Taylor had a green light, Mrs. Bateman had to have a red light. [SR416] If Mr. McAninch saw a car turn left from the southbound left turn lane of Lyons Road and travel left to right across his path before the collision, Mrs. Bateman ran a red light. If Mr. McAninch saw the other cars going east and west on S.W. 18th St. stop before the collision, Mrs. Bateman ran a red light. [SR410]

Mr. Moss based his conclusion that Mrs. Bateman ran a red light and caused the collision upon all of the evidence mentioned above. After the voir dire, the trial court decided that the expert's opinions were "speculation" and excluded

them from evidence. [R2305. 2332]

Defendant's argument

Defense counsel made a powerful closing argument based upon the failure of proof that resulted from exclusion of Miles Moss's opinions coupled with Susan Bateman's testimony about the "little gold car" which he called "the fourth vehicle":

> "He hires Miles Moss, tells you in opening Mr. Moss is going to come in here and tell you Mrs. Bateman ran the red light. He didn't do that...
>
> "Once again, the most interesting part of the testimony or lack of testimony for Miles Moss...is the fourth vehicle. No one wants to talk about the fourth vehicle because it doesn't fit the story. It doesn't help their case.
>
> "The fact of the matter is that Moss had to admit on my cross examination of the existence of this fourth vehicle, which after the accident pulled off down here on the road. That's the gold vehicle that my client saw when she approached the intersection and looked over her right shoulder.
>
> "Why is that important? Because if you look at the pictures, and they say a picture is worth a thousand words, you see this scrape mark of that gold vehicle on the back of my client's car.
>
> "Which means that she is also going through the intersection at the same time. **Is Plaintiff contending that both of them were running a red light?**" [R2547-2548]

Evidence that Susan Bateman deceived the jury.

After the trial, Plaintiff obtained a copy of a taped statement Susan Bateman gave Regina Haynes eight days after the collision. [R2719, 2036] \1 Mrs. Bateman contradicted her trial testimony concerning the "little gold car." Actually, she stated a different version of the collision which omitted any reference to the "little gold car."

> "A: Uh, when I looked and I saw the green light, I saw the white stripes. I saw two cars in the Northbound lane of Lyons stopped at the intersection. Then in the left corner of my eye I saw this guy coming southbound on Lyons and he was traveling fast. I hit the brakes as hard as I could and the impact, I impacted him just inside the intersection." [R2038, 2694-2695]

Mrs. Bateman did not say she saw the little gold car when she described the accident to Regina Haynes.

Moreover, Susan Bateman told Regina Haynes that she discovered the "fourth vehicle" several days after the collision.

> "A: Uh, **I have found out since all this happened that there was a 4th car**.
> "Q: A 4th car?
> "A: Yes, and they left the scene. Now my husband went and took pictures. They're still in the camera. But that car ended up—
> "Q: But you only heard about this later on?
> "A: Yes.
> "Q: Yeah.
> "A: **I heard about this the day before yesterday**.
> "Q: Who told you that? The police officer?
> "A: One other police officer that Brooks talked to told him this.

"Q: Wow." [R2044-2045, 2710-2711]

Obviously, Susan Bateman's trial testimony concerning the "little gold car" contradicted not only the statement she gave Regina Haynes, but also the testimony of Frederick McAninch, who testified there were only three vehicles involved in the collision. [R2201] Mr. McAninch also testified that traffic going east and west on S.W. 18th St. stopped before the collision. [R2195] Specifically, Mr. McAninch testified that, before the collision, a car stopped in the outside eastbound lane of S.W. 18th St. (where there is an asterisk on A-8) where Susan Bateman said the "little gold car" went. [R2196-2197]

Furthermore, Mr. McAninch testified that before the collision, "the fourth car" to which defense counsel referred when he mentioned Miles Moss's testimony, went south on Lyons Rd., turned left, went east on S.W. 18th St., and then pulled over to the side of the road after the collision. [R2190, 2194-2195] Mr. McAninch testified that he told that to the investigating officer. [R2190]

Only Susan Bateman said a little gold car went east on S.W. 18th St. [R2572-2573] Only defense counsel said the fourth car was "running a red light." [R2547-2548]

Mr. Taylor's truck was totaled. He was transported to a hospital and incurred medical expenses. He sustained a right shoulder impingement syndrome as a result of the collision. Over time, he developed a torn rotator cuff. He had an open surgery on his shoulder which did not help. Now, he has a frozen shoulder.

Second collision

Mr. Taylor contends that his shoulder injury was aggravated as a result of a second collision which happened on January 9, 1998 on Interstate 95 in Boynton Beach, Florida. Mr. Taylor was driving north in the inside (fast) lane of I-95. Jennifer Mathie was right behind him driving

a car owned by her father, James Mathie. The traffic slowed and Mr. Taylor applied his brakes. Ms. Mathie hit him from behind.

The Mathies stipulated that Jennifer Mathie was negligent and her negligence caused the collision. [R1553]

The only real issue related to the amount of damages. The uncontroverted evidence showed that Mr. Taylor's car was damaged as a result of the collision. When Ms. Mathie hit Plaintiff from behind, her license plate left quite an impression on Mr. Taylor's rear bumper. [R5J1, R5J2] As a result, the bumper needed to be replaced. Mr. Taylor testified about a verbal estimate amounting to approximately $600.00. [T133] Thus, there was uncontroverted evidence that Plaintiff sustained some loss, injury or damage. Additionally, Plaintiff testified that the injuries he sustained as a result of the Bateman collision were aggravated by the Mathie collision.

On January 16, 2004, the jury returned a verdict indicating that there was no negligence on the part of any of the defendants that was a legal cause of any damage to Stephen Taylor. [R1926]

Subsequently, the Court entered judgments which followed the verdict. [R67, 2539]

Post-trial proceedings

On January 23, 2004, Plaintiff filed a motion for new trial. [R1998] On April 5, 2004, the Court entered an order denying in part and deferring in part upon Plaintiff's motion for a new trial. [R2485]

On April 6, 2004, Plaintiff filed an amendment to his motion for a new trial to clarify an issue as to which the Court had reserved ruling. The amendment stated:

> 6. It appears that during the trial Mrs Bateman gave false, inaccurate, and/or misleading testimony as to liability and as a

> result Defendants prevailed. Accordingly, the Court should grant a new trial even without requiring a showing that newly discovered evidence would produce a different result on a new trial...Alston v. Shiver, 105 So.2d 785 (Fla. 1958)...Kenet v. Bailey, Hunt, Jones & Busto, 25 F.L.W. D1605 (Fla. 3d DCA 2000). [R2487]

As indicated in footnote 1 infra., after the verdict there was quite a battle regarding production of Susan Bateman's statement to Regina Haynes.

Before the trial, Defendant produced an incomplete and illegible transcript of the recorded statement she gave Regina Haynes eight days after the collision. On July 31, 1996, Mrs. Bateman told Regina Haynes she found out about the fourth vehicle "the day before yesterday." That would be six days after the collision. Well, the transcript Defendant produced before the trial was incomplete. The right margin of the critical page was cropped such that the reader could not know the identity of the person who found out about the fourth vehicle "the day before yesterday." The meaning of the rest of the statement turned on the identity of the person who found that out. Accordingly, before reviewing the tape recording, counsel could not tell whether the statement Susan Bateman gave Regina Haynes contradicted the testimony she gave at trial about seeing the little gold car next to her van going east just before the impact.

After the trial, on June 25, 2004 Defendant produced a duplicate tape of the statement and Plaintiff's attorney learned and confirmed that it was **Susan Bateman** who found out about the fourth vehicle six days after the collision. On June 30, 2004 Plaintiff served requests for admissions as to the authenticity of the tape [R2679], and on July 1, 2004 Defendant admitted that the duplicate tape "...is a true, complete, and accurate copy of the original tape recording of said statement." [R2687] On July 2, 2004, Plaintiff

filed a court reporter's transcript of the tape. [R2691]

Additionally, pursuant to Florida Rule of Civil Procedure 1.370 (2004), Plaintiff requested that Susan Bateman admit that:

> 1. On July 31, 1996 Susan Bateman gave a recorded statement to Regina Haynes.
>
> 2. At that time Susan Bateman described how the collision dated July 23, 1996 happened.
>
> 3. At that time Regina Haynes asked Susan Bateman how the accident happened.
>
> ***
>
> 5. When Susan Bateman described how the collision happened in response to the question.... she failed to mention seeing a small gold car on her right after she applied her brakes just before the impact.
>
> 6. On that date Susan Bateman admitted that she "found out since all this happened that there was a fourth car."
>
> 7. On that date Susan Bateman admitted that she found out about the fourth car "the day before yesterday."
>
> 8. Susan Bateman found out about the fourth car several days after the collision happened.
>
> ***
>
> 10. There is attached to this paper a true copy of an accurate albeit incomplete transcript of the statement Susan Bateman gave Regina Haynes on July 31, 1996.

On June 30, 2004, pursuant to a Court order, Defendant served the following responses to Plaintiff's said requests for admissions:

> 1. Admitted.
>
> 2. The statement I provided to Regina

Haynes attached to the request for admissions is a true and accurate representation of her questions and my responses with regard to the accident of July 23, 1996.

3. Please see response to #2.
5. Please see response to #2
6. Please see response to #2.
7. Please see response to #2.
8. Please see response to #2.

***

10. Admitted. [R2685]

Plaintiff contends that requests 2, 3, 5, 6, 7, and 8 should be deemed admitted pursuant to Florida Rule of Civil Procedure 1.370 (2004).

On July 9, 2004, the Court entered an order denying Plaintiff's motion for new trial (issues deferred) and amendment thereto. [R2748]

On August 6, 2004 Plaintiff filed a notice of appeal. On appeal Petitioner contended that denial of his motion for a new trial constituted an abuse of discretion because Susan Bateman's false testimony warranted a new trial. Specifically, in Appellant's amended initial brief, he argued:

> "The United States Supreme Court holds that the Due Process Clause of the United States Constitution is violated if the prosecution obtains a conviction by use of perjury or fails to correct perjury. The false evidence must be material. It may relate to the credibility of an important witness. "A new trial is required if 'the false testimony... could in any reasonable likelihood have affected the judgment of the jury." Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L. Ed. 2d 104 1971). See also Mooney v. Holohan, 294 U.S. 103, 155 S.Ct. 340, 79

L.Ed. 791 (1935), Skipper v. Schumacher, 124 Fla. 384, 169 So. 58 (1936) and Spencer v. State, 842 So.2d 70 (Fla. 2003).

"Obviously, civil litigants are entitled to fair trials pursuant to the Due Process Clause of the Constitution.

"Inaccurate, false and misleading testimony on a crucial issue warrants a new trial especially if it comes from the prevailing party. Alston v. Shiver, 105 So.2d 785 (Fla. 1958), Kenet v. Bailey, Hunt, Jones and Busto, 785 So.2d 515 (Fla. 3d DCA 2000), cert. den. 792 So.2d 1213 (Fla. 2001)..." [Appellant's amended initial brief, pps. 30-31]

(In his Amendment to Motion for New Trial Petitioner argued that Susan Bateman's false testimony warranted a new trial, but Petitioner contended for the first time on appeal that there was a violation of the Due Process Clause).

In response, the Batemans argued the following points: (1) The plaintiff had a copy of the statement before the trial, so it was not newly discovered evidence; (2) The statement was at most minor impeachment because it was given eight years before trial; and (3) Appellant failed to clearly show prejudicial reversible error. [Brief of Appellees Susan Gasink Bateman and Brooks W. Bateman, pps. 38-41]

The Mathies also argued that Susan Bateman's statement was not newly discovered evidence and that Plaintiff's trial attorney had the evidence in his possession at trial but simply elected not to use it for cross examination. (In other words they argued Plaintiff waived the point). [Answer Brief of Appellees Jennifer Lynn Mathie and James M. Mathie, pps.21-24]

In response, Mr. Taylor pointed out the fact that Appellees never denied that Susan Bateman's trial testimony was inaccurate, false, misleading, deceptive and material, or that it probably affected the judgment of the jury. "In

other words, they silently conceded all the elements listed by the United States Supreme Court for a Due Process violation." [Appellant's reply brief to Batemans' answer brief, p. 11] Indeed, Plaintiff argued that Susan Bateman's false testimony was the most persuasive evidence she had that she had a green light and Mr. Taylor ran a red light.

Plaintiff also argued that the copy of the statement counsel had during the trial was incomplete and partly illegible, but it was not until after the trial that Plaintiff obtained a tape and a transcript thereof and the aforementioned judicial admissions.

Finally, Plaintiff argued that it simply did not matter whether the evidence was "newly discovered." Susan Bateman's false and misleading testimony warranted a new trial regardless. "Susan Bateman's inaccurate, false, misleading and deceptive testimony warrants a new trial whether or not the technical requirements for granting a new trial are met because Stephen Taylor's right to Due Process of law was violated and the verdict is a manifest injustice." [Appellant's reply brief to Batemans' answer brief, pps. 10-14]. See also Appellant's reply brief to Mathies' answer brief, pps. 9-13.

Additionally, Plaintiff contended on appeal that exclusion of Miles Moss's opinions constituted reversible error.

On January 4, 2006 the Fourth District Court of Appeal rendered a PCA. Accordingly, Petitioner filed a motion for rehearing, motion for rehearing en banc, motion for certification, and motion for clarification and request for written opinion. On May 3, 2006, the Fourth District Court of Appeal withdrew their PCA and rendered an opinion. The Court affirmed, stating that: "First, the trial court properly excluded the plaintiff's reconstruction expert's testimony concerning the color of each party's traffic signal before the accident as speculative. See Bryant v. Buerman, 739 So.2d 710, 712 (Fla. 4th DCA 1999)..." The opinion did not

expressly address Plaintiff's argument that Susan Bateman's false testimony caused a denial of due process of law and warranted a new trial.

On May 30, 2006, Petitioner filed a notice to invoke discretionary jurisdiction of the Florida Supreme Court based on express and direct conflict between the decision below and a decision of the Florida Supreme Court and a decision of another District Court of Appeal on the same question of law.

On June 8, 2006, Plaintiff filed a brief on jurisdiction and contended that the Fourth District Court of Appeal applied the wrong standard of review, the abuse-of-discretion standard, to the issue relating to admissibility of Miles Moss's opinions that Susan Bateman ran a red light and caused the collision. Plaintiff contended that admission or exclusion of speculation is not a discretionary decision; that the expert's opinions did not constitute speculation; and that the trial court failed to correctly apply the rules of evidence that permitted admission of the opinions into evidence.

For the purpose of preserving the point for Supreme Court review, Plaintiff asked Florida's highest Court to exercise its ancillary jurisdiction to correct the due process violation, even though the lower Court's opinion did not mention Susan Bateman's testimony or the Due Process Clause and the Florida Constitution limits the Florida Supreme Court's jurisdiction to cases involving "express" and direct conflict. [Petitioner's brief on jurisdiction, pps. 8-10]

On September 21, 2006 the Supreme Court of Florida determined that it should decline to accept jurisdiction, and denied petition for review.

Within ninety days thereafter Petitioner filed a petition for a writ of certiorari in the United States Supreme Court.

ARGUMENT

Point I—Denial of Plaintiff's amended motion for a new trial was fundamental error because Susan Bateman's false testimony warranted a new trial.

Susan Bateman testified that **she saw** the "little gold car" next to her van going the same direction she was after she saw Mr. Taylor's truck coming. Obviously, that testimony was not true. Eight days after the collision, she told Regina Haynes: "I heard about this [fourth vehicle] the day before yesterday". She said heard about it from her husband, who had talked to a police officer. Mr. McAninch told the investigating officer that the fourth vehicle turned left from the southbound left turn lane on Lyons Rd., traveled east on S.W. 18th St., and pulled over to the side of the road after the collision. [R2190, 2189-2191, 2194-2195] Evidently, Brooks Bateman misunderstood what Corporal Stickley said about the fourth vehicle.

Nobody else saw any "little gold car." Mr. Taylor could not have avoided such a phantom vehicle if it had been in the intersection when the Batemans' van slammed into the right door of his truck and pushed it toward Mr. McAninch's car.

The false testimony supported the Batemans' primary defense. It led the jury to believe that two cars were going east through the intersection at the same time Mr. Taylor was going south on Lyons and, therefore, Mrs. Bateman had a green light.

Plaintiff raised the issue at the earliest opportunity by filing a motion for new trial. Plaintiff expressly reserved the right to amend his motion based upon newly discovered evidence if he could obtain a legible and complete copy of the statement Susan Bateman gave Regina Haynes. [R2004] On April 5, 2004, the Court issued an order denying Plaintiff's motion for new trial in part, but the

Court deferred ruling on issues relating to Susan Bateman's statement. On April 6, 2004, Plaintiff served an amendment to his motion for new trial which clarified the issue relating to Susan Bateman's statement. [R2487]

Subsequently, Plaintiff obtained a duplicate of the tape of the statement Susan Bateman gave Regina Haynes, had it transcribed, and filed the transcript. [R2719]

Thereafter, Plaintiff contended he was entitled to a new trial because of newly discovered evidence, that being (1) a complete legible transcript of Susan Bateman's statement and (2) Defendants' response to Plaintiff's request for admissions, i.e., judicial admissions that Susan Bateman admitted that she found out about the fourth car "the day before yesterday," which was six days after the collision.

Plaintiff also contended that he was entitled to a new trial, whether or not the statement was "newly discovered evidence" because Susan Bateman's false testimony misled the jury and warranted a new trial in any case.

On July 9, 2004, the Court denied Plaintiff's motion. That order constituted fundamental error, a denial of due process of law, and harmful reversible error.

- This Honorable Court holds that the due process clause of the United States Constitution is violated if a prosecutor obtains a conviction by use of perjury, or fails to correct perjury. The false evidence must be material. It may relate to the credibility of an important witness. "A new trial is required if 'the false testimony...could in any reasonable likelihood have affected the judgment of the jury." Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1971). See also Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935). Skipper v Schumacher, 124 Fla. 384, 169 So. 58 (1936). Spencer v. State, 842 So.2d 70 (Fla. 2003).

> "...that requirement [due process]...embodies the fundamental conceptions of justice which

> lie at the base of our civil and political institutions. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to produce the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." Mooney v. Holohan, 294 U.S. at 112.

The same ideal applies to civil trials. Obviously, civil litigants are entitled to fair trials pursuant to the Due Process Clause of the Constitution.

Florida Courts recognize that denial of due process constitutes fundamental error that can be raised for the first time on appeal. Sanford v. Rubin, 237 So.2d 134, 137 (Fla. 1970), Hooters of America, Inc. v. Carolina Wings, Inc., 655 So.2d 1231 (Fla. 1st DCA 1995).

Florida Courts also recognize that inaccurate, false and misleading testimony on a crucial issue in a civil trial warrants a new trial especially if it comes from the prevailing party. Alston v. Shiver, 105 So.2d 785 (Fla. 1958), Kenet v. Bailey, Hunt, Jones and Busto, 785 So.2d 515 (Fla. 3d DCA 2000), cert. denied, 792 So.2d 1213 (Fla. 2001), Storm v. Allied Universal Corp., 825 So.2d 241 (Fla. 3d DCA 2001), and Gaiter v. Winn Dixie Stores, 376 So.2d 912 (Fla. 3d DCA 1979). Indeed, the Florida Supreme Court relaxed the technical requirements for a new trial in cases where parties give false testimony. In Ogburn v. Murray, 86 So.2d 796 (Fla. 1956) the Court stated:

> "This Court has said that the rules as to

newly discovered evidence are not inflexible and must sometimes bend in order to meet the ends of justice. Gaiter v. Anderson, 103 Fla. 1190, 135 So. 840, 139 So. 587, 588; and we think of no more appropriate situation for "bending" the rules than the one presented here, where the only reasonable and logical inference is that Wilson [one of the plaintiffs] deliberately falsified his earnings. Other courts have so held in analogous situations." Id. at 798.

Subsequently, in Alston v. Shiver, 105 So.2d 785, (Fla. 1958) the Court elaborated:

> "The established general rule is that a motion for new trial based upon newly discovered evidence will not be granted unless certain requirements are met. One of these requirements is that such evidence would probably change the result of the case upon a new trial....because of the court's and the public abhorrence of false testimony, an exception to the general rule has been established. This exception is applicable to the case now before us. Under this exception, the rule is relaxed where it is shown that the prevailing party knowingly gave or used false testimony. In such event a new trial on all issues is allowable at the Court's discretion without it having to be first shown that the newly discovered evidence will probably produce a different result on the new trial." Alston v. Shiver, 105 So.2d at 788-789 (Fla. 1958).

Kenet v. Bailey, Hunt, Jones and Busto, supra., was an appeal from a judgment entered upon a jury verdict denying punitive damages. Kenet was Bailey's client. Bailey

converted Kenet's settlement proceeds to his own use by transferring the funds from his law firm trust account into Bailey's personal account. On a previous appeal, the Third District Court of Appeal had directed the trial court to enter a judgment for compensatory damages in favor of Kenet, reversed an order denying Kenet's claim for punitive damages, and remanded for new trial as to punitive damages.

During the trial on Kenet's claim for punitive damages, Bailey testified about "his lengthy good standing with the Florida Bar and the lack of any prior problems with Bar grievance proceedings against him." He testified that there had never been a "probable cause" finding against him in any Bar proceeding, including this case. Plaintiff's lawyer objected saying: "This case is open and pending, your Honor." To that Bailey responded: "The case is not open and pending and that is not correct, sir." That testimony was not true and Bailey knew it. Four months before the trial, Bailey was given notice that the Bar was investigating the matter. Two months before the trial Bailey submitted a preliminary response to the Bar urging dismissal because of collateral estoppel. The Court of Appeals determined that Bailey's testimony was crucial to the verdict.

Accordingly, the appellate Court concluded that:

> "Bailey's testimony may not have been perjurious, but it certainly was inaccurate and misleading. The trial court accepted this testimony or allowed it to go unpunished. In our view, this was an abuse of discretion. We thus reverse and remand for new trial on the issue of punitive damages." Kenet, 785 So.2d at 517.

Therefore, a defendant's inaccurate and misleading testimony on a crucial issue warrants a new trial and it is an abuse of discretion not to grant one.

Also, in Gaiter v Winn Dixie Stores, Inc., 376 So.2d 912 (Fla. 3d DCA 1979), Plaintiff, Gaiter, sued Winn Dixie

after a shelf in a store collapsed and injured her ankle.

During the trial, Gaiter testified that she could not drive because of her back and knee pain. During cross examination, defense counsel produced a traffic ticket a policeman in Tampa issued to Gaiter after the accident. Gaiter insisted that her son was driving her car, but because she was responsible for him, the officer gave her the ticket. The jury returned a verdict for the plaintiff and awarded $75,000. At some point, the trial Court asked the State Attorney to do an investigation and determine who was driving the car. When the Court received notice that it was Gaiter who was driving, he issued an order to show cause why new trial should not be granted because Gaiter perjured herself. After a hearing, the Court vacated a directed verdict in favor of Gaiter and the judgment and ordered a new trial.

The Third District Court affirmed, saying:

> "The controlling principle of law is that where it is shown that the prevailing party ...knowingly gave or used false testimony, the trial court in its discretion may grant a new trial without the requisite showing that the newly discovered evidence would probably produce a different result on the new trial. *Alston*." Id. at 913.

Obviously, Courts have inherent authority to punish litigants for deception. There is a good reason. If all Courts let witnesses lie to juries, the truth would never be known, the fact finding system would break down, and nobody would get true justice. "A system that depends on an adversary's ability to discover falsehoods is doomed to failure, which is why this kind of conduct must be discouraged in the strongest possible way." Storm v. Allied Universal Corp., 842 So.2d 245, 252-253, Appendix A (Fla. 3d DCA 2001). Indeed, the trial Court had the power not only to grant a new trial, but also to strike Defendants' pleadings and enter a default judgment in Plaintiff's favor.

"We recognized in Kornblum v. Schneider, 609 So.2d 138, 139 (Fla. 4th DCA 1982), that where a party perpetrates a fraud on the court which permeates the entire proceedings, dismissal of the entire case is proper....We believe that the trial court has the right and obligation to deter fraudulent claims from proceeding in Court." Savino v. Florida Drive In Theatre Management, Inc., 697 So.2d 1011, 1012 (Fla. 4th DCA 1987)

In Storm, supra., the trial court observed: "Where it is shown that the prevailing party knowingly gave or used false testimony, the trial Court in its discretion may at the very least, grant a new trial." Storm, Appendix A, 842 So.2d at 252.

In response to Plaintiff's amended motion for new trial, Defendants argued that Susan Bateman's statement did not constitute "newly discovered evidence" because the undersigned attorney had an incomplete copy thereof before the trial.

However, that argument was not true. Just compare the relevant excerpt of the document Defendants produced before the trial with the court reporter's transcript of the tape Defendants produced after the trial. The statement Defendants produced before trial stated:

A: "...Uh,...have found out since this all happened that there was a 4th car.

Q: A 4th car?

A: Yeah...

Q: But you only heard about this later on?

A: Yes.

Q: Yeah.

A: I heard about this the day before yesterday.

Q: Who told you that? The police officer?

A: One other police officer that Brooks had talked to told him this....

The court reporter's transcript of the tape Defendants produced after the trial stated in pertinent part: "Now, I have found out since all this happened that there was a fourth car." As you see, the transcript Defendant produced before the trial omitted the identity the person who "...found out since all this happened that there was a 4th car." As far as Plaintiff's trial counsel knew, the missing pronoun or words could have been "I", "they", or "the police." The meaning of the rest of the passage could change depending upon the identity of that person. Without knowing that, it was impossible to tell whether Mrs. Bateman's prior statement was inconsistent with her trial testimony.

It would have been improper for counsel to try to impeach Mrs. Bateman by use of an illegible and incomplete copy of a prior statement that was not clearly inconsistent with her trial testimony. ss. 90.614 (2), 90.952, 90.953(3), 90.108, Fla. Stat. (2004)

It also would have been impossible. The Court will fully appreciate the predicament of Plaintiff's counsel, if it will review the transcript of the cross examination of Susan Bateman [R2578-2651] and take notice of how resistant she was. Counsel could not attempt to impeach Mrs. Bateman with the illegible, incomplete statement, without risking loss of credibility with the jury. It would have been foolish to try.

Defendant created the problem by flouting the Court order compelling production of a copy of the statement "in its entirety" before the trial. [R1853]

However, respectfully, it should not really matter whether the tape of Susan Bateman's statement was "newly discovered evidence." The critical point is that Susan Bateman gave false and deceptive testimony and defense counsel used that evidence to persuade the jury that Mrs. Bateman had a green light and she was not liable for the collision. That argument became the primary defense. There is a reasonable likelihood that Mrs. Bateman's false

testimony affected the judgment of the jury.

Defendant's deception warrants a new trial of all claims. Kenet, supra. Obviously, after the jury believed that Susan Bateman had the green light, it had to conclude that Mr. Taylor lied about stopping at a red light and going on green. It must have enraged the jury to think Plaintiff sued Defendants and lied to them.

With Plaintiff's credibility down the drain, it was easy for the jury to reject all of Plaintiff's claims, including his claim against the Mathies. Thus, the jury obviously concluded that Plaintiff did not suffer any damage as a result of the second collision dated January 9, 1998. Jennifer Mathie admitted that her negligence caused that collision. The Court admitted pictures showing the damage to his car. Plaintiff testified about a verbal estimate amounting to hundreds of dollars. The jury still returned a no liability verdict against Plaintiff and in favor of all defendants.

Probably, the jury was angry at Plaintiff for lying, but it was Susan Bateman who gave false testimony about the "little gold car." The Court should have granted Plaintiff a new trial as to all claims. It was fundamental error to deny Plaintiff's amended motion for new trial. The ruling denied Plaintiff due process of law. This Honorable Court should reverse the judgment and remand this case for a new trial as to all issues.

Point II—Exclusion of Miles Moss's opinions was judicial error that led to a manifest injustice.

The trial Court erroneously excluded Plaintiff's accident reconstruction expert's opinions from evidence, saying they were "speculation".

The applicable standard of review is de novo, because the issue turns on application of a known rule of evidence to established facts. Ornelas v. United States, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911, 919 (1996). Pullman-

Standard v. Swint, 456 U.S. 273, 289, n. 19, 102 S.Ct. 1781, 72 L Ed 2d 66, 80(1982), Simmons v. Conger, 86 F.3d 1080 (11th Cir. 1996).

The standard of review cannot be abuse of discretion because the decision whether to admit or exclude speculation is not subject to the trial court's discretion. Speculation fails the test of competency. It is never admissible over objection because it has no probative value. When the objection is "speculation," the only question trial court must answer is whether the evidential offer is or is not speculation. That decision does not involve the exercise of discretion. Speculation is a supposition without a premise of fact. Drackett Products Co. v. Blue, 152 So.2d 463 (Fla. 1963). Either there is a factual predicate for the opinion or there is not. There is no good reason why an appellate court should ever defer to a trial court about speculation.

> "Many cases have restated the general rule that a trial court decision admitting or excluding evidence is discretionary and therefore reviewable by the abuse of discretion standard. This is, perhaps, too broad a statement of the rule. Most of the decisions citing the rule are actually limited to situations in which the trial judge had determined logical relevance in the context of an entire trial. While the issue of relevancy is discretionary, many other evidence issues are not. For example, **trial judges clearly do not have discretion to admit evidence in violation of a privilege or some other definitive provision of the evidence code**. Some of these evidence issues are more like questions of law than questions of discretion." Padavano, Florida Appellate Practice, s. 9.5, pps. 169-170 (Thomson-West, 2006).

Let us analyze the admissibility of the opinions.

There was no objection to Mr. Moss's qualifications.

Mr. Moss would have opined that Susan Bateman ran a red light and that caused the collision. Obviously, those opinions were material and relevant. They related to the main liability issue. ss. 90.402, 90.703, Fla. Stat. (2005).

Opposing counsel objected that: "[Mr. Moss's opinions] are not expert opinions and are not going to aid this jury." [R2292] The objection was not well taken. The subject matter of Mr. Moss's opinions was beyond the common knowledge and understanding of the average layman. Mr. Moss would have helped the jury understand the evidence as to how the accident happened and determine the most important fact at issue, who ran the red light. s. 90.702, Fla. Stat. (2005). Several Florida cases hold that such opinions are admissible. See Figueredo v. Keller Industries, Inc., 583 So.2d 432 (Fla. 3d DCA, 1991), Zwinge v. Hettinger, 530 So.2d 318 (Fla. 2d DCA 1988) and Alexander v. Penske Logistics, Inc., 867 So.2d 412 (Fla. 3d DCA 2003).

It appears that no judge has explicitly agreed with the defendants' objection. The trial court did not talk about it and the appellate panel apparently applied an abuse-of-discretion standard of review and deferred to the possibility that reasonable men might have disagreed as to the validity of the objection.

The trial Court decided that Mr. Moss's opinion that Susan Bateman ran the red light was speculation. [R2305] but Defendants did not object to the evidence upon that basis and there was a factual predicate for Mr. Moss's opinions. The expert's report [R2305] set forth a sufficient factual predicate for the opinions. The trial court simply misunderstood or misanalyzed the factual predicate, erroneously concluded the opinions were speculation, and incorrectly applied the Florida Evidence Code. (If the appellate Court would have reviewed the issue of whether the opinions were speculation de novo, it would have had to conclude that there was a sufficient factual predicate and

the opinions were admissible under Florida Statutes s. 90.705(2)).

The error was harmful and reversible. Obviously, in our case there was a hot dispute as to liability because of Susan Bateman's self-serving testimony. Mr. Moss's opinion related to the biggest issue in the case, who ran the red light. Given the ruling, Mr. Moss had to avoid the real issue and the impact of his testimony was lost completely. Martinez v. Vega, 751 So.2d 1268 (Fla. 3rd DCA 2000) is right on point. In that case, the Court reversed a defense verdict and remanded for a new trial because the Court abused its discretion by excluding testimony that immediately after the collision the Plaintiff said Defendant ran the red light. The Court indicated the error was harmful. "With such a hotly disputed point at issue, we conclude that the error complained of resulted in a miscarriage of justice." Id. at 1270.

Moreover, exclusion of Mr. Moss's opinion was devastating to the credibility of Plaintiff's trial counsel. In the opening statement, the undersigned attorney truthfully told the jury that Mr. Moss concluded that Susan Bateman ran the red light. Plaintiff could not introduce evidence of that because of the Court's ruling. Of course, defense counsel exploited that omission in his final argument:

> "He hires Miles Moss, tells you in opening Mr.Moss is going to come in here and tell you Mrs.Bateman ran the red light. He didn't do that...Once again, the most interesting part of the testimony or lack of testimony for Miles Moss...is the fourth vehicle..." [R2547-2548]

Obviously, that failure of proof had to affect the jury's perception of Plaintiff's case and credibility and that contributed to a miscarriage of justice.

CONCLUSION

Plaintiff Petitioner, Stephen D. Taylor, prays that this Honorable Court grant his petition for a writ of certiorari, reverse the judgment in favor of all defendants and remand this case for a new trial on all issues.

---

1. Plaintiff's attorney discovered the existence of the statement during the deposition of Defendant's expert, Kenneth Bynum.

However, Mr. Bynum produced an incomplete copy of the statement pursuant to Plaintiff's subpoena. It was cropped such that letters and/or words were missing from the right sides of several pages and lines were missing from the bottoms of several pages. [R2036-2046] Plaintiff requested a complete copy of the statement from Defendant and filed a motion to compel. [R1851] On January 5, 2004, seven days before the trial, the Court entered an order granting Plaintiff's motion. [R1853] In response to that order, Defendant produced another incomplete copy of the statement. [R2036]

During the trial, Plaintiff's undersigned attorney did not have a complete copy of the statement which could be used to impeach Susan Bateman.

After the trial, Plaintiff filed a motion for a new trial and requested a complete copy of the statement again. [R1998, 2239] Defense counsel responded that he did not have a complete copy. Plaintiff filed a motion to compel and for sanctions. [R2222] The Court denied Plaintiff's motion. [R2490]

Thereafter, Plaintiff filed a notice of deposition of Allstate Insurance Company [R23] and served a subpoena duces tecum for deposition which required production of the original statement or a true copy thereof. [R27] Defendant filed a motion for protective order. [R2511] On June 23, 2004, the Court denied Defendant's motion in part and permitted Plaintiff to depose Allstate Insurance Company. [R2665]

Subsequently, Defendant produced a duplicate tape of the statement and admitted that it was an accurate copy of the original. [R2679, 2687] Apparently, Allstate had the tape all along. Subsequently, Plaintiff's undersigned attorney asked a court reporter to transcribe the tape and filed the transcript. [R2690]

Additionally, on April 8, 2004 Plaintiff served requests for admissions. [R2494] On June 25, 2004 the Court ordered Defendant to respond. [R2665] On June 30, defense counsel faxed a response. [R2685].

APPENDIX

Supreme Court of Florida

THURSDAY, SEPTEMBER 21, 2006

CASE NO.: SC06-1112
Lower Tribunal Nos.: 4D04-3065,
4D06-3438

STEPHEN D. TAYLOR vs. SUSAN GASINK BATEMAN, ET AL.

Petitioner(s) Respondent

This cause having heretofore been submitted to the court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. See Fla. R. App. P. 9.300(3).

WELLS, ANSTEAD, PARIENTE, QUINCE and CANTERO, J. J., concur.

A True Copy
Test:

(signed)
Thomas D. Hall
Clerk, Supreme Court

mc
Served:

Suzanne P. Mills
James A. Munsey
Paul Richard Bloomquist
Mark D. Tinker
Richard A. Sherman. Sr.
Charles W. Hall
Honorable Marilyn Beuttenmuller. Clerk
Honorable Sharon Bock. Clerk
Honorable Timothy McCarthy. Judge

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
January Term 2006

STEPHEN TAYLOR,
Appellant,

v.

SUSAN GASINK BATEMAN, BROOKS W. BATEMAN, JENNIFER LYNN MATHIE and JAMES M. MATHIE,

Appellees
Nos. 4D04-3065 and 4D04-3438
[May 3, 2006]

ON MOTIONS FOR REHEARING, REHEARING EN BANC, AND FOR CLARIFICATION AND A WRITTEN OPINION.

PER CURIAM.

We deny the plaintiff's motion for rehearing and rehearing en banc, but grant the motion for clarification and a written opinion. We withdraw our previously issued opinion an substitute this opinion in its place.

The plaintiff appealed from a defense verdict arising from two separate automobile accidents that were tried together. The Plaintiff raised multiple issues, including the exclusion of testimony from the plaintiff's reconstruction expert and resulting prejudice, the use of the defendant's proposed verdict form and the denial of his motion for new trial. We affirm of all issues.

First, the trial court properly excluded the plaintiff's reconstruction expert's testimony concerning the color of each party's traffic signal before the accident as speculative. See Bryant v. Buerman, 739 So.2d 710, 712 (Fla. 4th DCA 1999). The court allowed the expert to testify on all other matters concerning the speed, stopping distances, and reaction times. Further, any prejudice that resulted from plaintiff's counsel's decision to advise the jury that the expert would be testifying concerning of the traffic lights and then being unable to elicit that testimony, lies in his trial strategy and not in any error on the part of the trial court.

Second, the verdict was not contrary to the manifest weight of the evidence. Although the plaintiff testified to property damage to his vehicle, counsel chose not to ask for an instruction on those damages, did not include that element of damage on the verdict form, and chose not to request those damages in his closing argument.

Third, this was a multi-day trial involving two separate automobile accidents for which only partial transcripts were provided to this Court for review. The piecemeal transcripts deprived this court of the ability to review the record as a whole. Such record omissions are fatal to an appeal. Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150, 1152 (Fla. 1979).

Affirmed.

Stone, Gross, and May, J. J., concur.

* * *

Consolidated appeal from the Circuit Court for the 15th Judicial Circuit, Palm Beach County; Timothy P. McCarthy, Judge; L.T. Case No. CL-99 3149AD.

Paul Richard Bloomquist, Tampa for appellant

Charles W. Hall and Mark D. Tinker of Fowler, White, Boggs & Banker, P.A., St. Petersburg for appellees Jennifer Lynn Mathie and James M. Mathie

Richard A. Sherman of Richard A. Sherman, P.A., Fort Lauderdale, for appellees Susan Gasink Bateman and Brooks W. Bateman

VERDICT

WE, THE JURY, RETURN THE FOLLOWING VERDICT:

1. Was there negligence on the part of the Defendant, SUSAN GASINK BATEMAN from the auto accident of July 23, 1996, which was a legal cause of any damages to Plaintiff, STEPHEN D. TAYLOR?

YES _____ NO __X__

If your answer to question #1 is "Yes", please answer question #2. If your answer to question #1 is "No", your verdict is for Defendants, SUSAN GASINK BATEMAN and BROOKS BATEMAN and you should go to question #4 and skip questions #2, #3, #5, #7, #9 and #11.

4. Was the negligence on the part of JENNIFER MATHIE from the auto accident of January 9, 1998 a legal cause of any damage to the Plaintiff, STEPHEN TAYLOR?

YES _____ NO __X__

If your answer to question #4 is "Yes", please continue. If your answer to question #4 is "No", your verdict is for Jennifer Lynn Mathie and James Mathie and you should skip questions #6, #8, #10 and #12.

IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. CL 99 3149 AD

STEPHEN D. TAYLOR,

Plaintiff,

vs.

SUSAN GASINK BATEMAN, BROOKS BATEMAN, JENNIFER MATHIE, and JAMES MATHIE,

Defendants

_____/

FINAL JUDGMENT FOR DEFENDANTS, SUSAN GASINK BATEMAN, BROOKS W. BATEMAN, JENNIFER LYNN MATHIE AND JAMES M. MATHIE

Pursuant to the verdict rendered in this action,

It is ADJUDGED that the Plaintiff, STEPHEN D. TAYLOR, take nothing by this action and that Defendant, SUSAN GASINK BATEMAN, BROOKS W. BATEMAN, JENNIFER LYNN MATHIE, and JAMES M. MATHIE, shall go hence without day.

This Court shall retain jurisdiction to entertain any motions to tax costs and/or attorney's fees if applicable.

DONE AND ORDERED at West Palm Beach, Palm Beach County, Florida this 27th day of January, 2004.

The Honorable Judge Timothy McCarthy
CIRCUIT COURT JUDGE

Copies furnished:

James M. Munsey, Esquire, 712 U.S. Highway One, Ste. 300, North Palm Beach, FL 33408; Paul Richard Bloomquist, Esquire, Post Office Box 15363, West Palm Beach, Florida 33416-5363
Suzanne P. Mills, Esquire, 515 North Flagler Drive, Suite 950, West Palm Beach, FL 33401

IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. CL 99-3149 AD

STEPHEN D. TAYLOR,

Plaintiff,

vs.

SUSAN GASINK BATEMAN,

Defendants.

ORDER GRANTING/DENYING
PLAINTIFF'S MOTION FOR NEW TRIAL
(ISSUES DEFERRED) AND AMENDMENT THERETO

THIS CAUSE having come before the Court on July 9, 2004 upon Plaintiff's motion for new trial dated January 23, 2004 and amendment to Plaintiff's motion for new trial dated April 2, 2004, if and the Court having heard argument of counsel and being otherwise fully advised of the premises, it is:

ORDERED that Defendant's said motion be and the same hereby is DENIED.

DONE AND ORDERED at West Palm Beach, Palm Beach County, Florida this 9th day of July, 2004.

SIGNED AND DATED

July 9, 2004

JUDGE TIMOTHY P. MCCARTHY
CIRCUIT COURT JUDGE

Copies furnished to: Paul Richard Bloomquist, Esq., P.O. Box 15363, West Palm Beach, FL 33416, James Munsey, Esq., 712 U.S. Highway One, Ste. 300, North Palm Beach, FL 33408, and Suzanne Mills, Esq., 515 North Flagler Drive, Suite 950, West Palm Beach, Florida 33401

DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

CASE NO. 4DCA#: 4D04-3065
4D04-3438

STEPHEN D. TAYLOR,

Appellant,

vs.

SUSAN GASINK BATEMAN,
et. al.,

Appellees.

MOTION FOR REHEARING

Plaintiff/Appellant, STEPHEN D. TAYLOR, pursuant to Florida Rule of Appellate Procedure 9.330 (2006), respectfully files this motion for rehearing and alleges:

***

14. The Court must have overlooked the **due process violation**, i.e. SUSAN BATEMAN'S false testimony about the alleged "fourth...gold vehicle" she said **she saw**. There can be no doubt that her trial testimony was false. After the trial, she admitted Plaintiff's eighth request for admission dated April 8, 2004: "SUSAN BATEMAN found out about the 4th car several days after the collision happened." Furthermore, the tape Allstate Insurance Company produced after the trial revealed that eight days after the collision, she told Regina Haynes: "**I heard about this the day before yesterday**." Moreover the testimony of all the other

witnesses refutes Mrs. Bateman's testimony about the alleged "fourth...gold vehicle." **Indeed, Appellees' briefs did not contend her testimony was true.** Obviously, SUSAN BATEMAN'S testimony was false.

15. It was material. Mr. Munsey stressed it in his summation. It probably affected the judgment of the jury. Use of Mrs. Bateman's testimony was a classic violation of due process of law. Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1971), Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 7991 (1935)...(The rest of her testimony was equally incredible. It was completely unrealistic. See Appellant's initial brief at pages 38 through 41).

16. Due process violations constitute fundamental error which can be raised for the first time on appeal. Hooters of America, Inc. v. Carolina Wings, Inc., 655 So.2d 1231 (Fla. 1st DCA 1995).

17. Under similar circumstances, the Third District Court of Appeal HELD it was an abuse of discretion to enter judgment upon a jury's verdict....

FLORIDA EVIDENCE CODE SECTIONS

Florida Statutes s. 90.108(1): "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him or her at that time to introduce any other part or any other writing or recorded statement that in fairness ought to be considered contemporaneously..."

Florida Statutes s. 90.402: "All relevant evidence is admissible, except as provided by law."

Florida Statutes s. 90.614(2): "Extrinsic evidence of a prior inconsistent statement by a witness is inadmissible unless the witness is first afforded an opportunity to explain or deny the prior statement and the opposing party is afforded an opportunity to interrogate the witness on it, or the interests of justice otherwise require. If a witness denies making or does not distinctly admit making the prior inconsistent statement, extrinsic evidence of such statement is admissible. This subsection is not admissible to admissions of a party-opponent as defined in s. 90.803(18)."

Florida Statutes s. 90.702: "If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified by knowledge, skill, experience, training or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

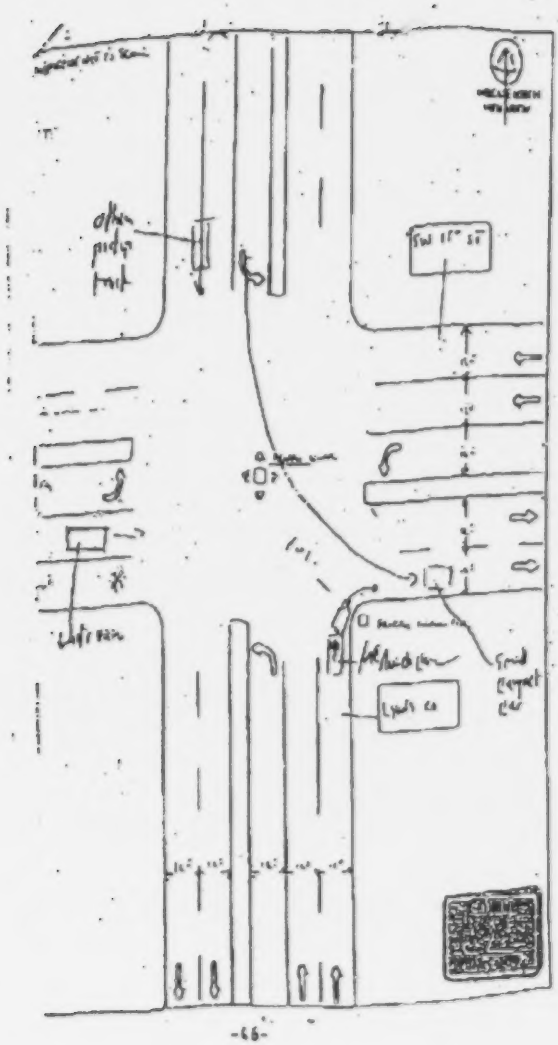
Florida Statutes s. 90.703: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it includes an ultimate issue to be decided by the trier of fact.

Florida Statutes s. 90.705: "(1) Unless otherwise required by

the court, an expert may testify in terms of opinion or inferences and give reasons without prior disclosure of the underlying facts or data. On cross-examination the expert shall be required to specify the facts or data. (2) Prior to the witness giving the opinion, a party against whom the opinion or inference is offered may conduct a voir dire examination of the witness directed to the underlying facts or data for the witness's opinion. If the party establishes prima facie evidence that the expert does not have a sufficient basis for the opinion, the opinions and inferences of the expert are inadmissible unless the party offering the testimony establishes the underlying facts or data."

Florida Statutes s. 90.952: "Except as otherwise provided by statute, an original writing, recording, or photograph is required in order to prove the contents of the writing, recording, or photograph."

Florida Statutes s. 90.953(3): "A duplicate is admissible to the same extent as an original unless: ...(3) It is unfair, under the circumstance, to admit the duplicate in lieu of the original."



R Blomquist
Attorney for Petitioner
Fla Bar No 283371
4/17/03